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May 20, 1996

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By Hand Delivery

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; CC Docket No. 96-98

Dear Mr. Caton:

Enclosed for filing with the Federal Communications Commission please find an original and 16 copies of the Comments of American Communications Services, Inc. regarding the above-referenced matter.

Please acknowledge receipt of this filing by date-stamping the duplicate provided and returning it to the bearer

Very truly yours,

Brad E. Mutschelknaus

Enclosures

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.

Respectfully submitted,

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May 16, 1996

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In the Matter of	)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.

American Communications Services, Inc. ("ACSI"), by its attorneys, hereby comments on second round issues raised in the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1]

SUMMARY

ACSI, a publicly traded Delaware corporation, through its operating subsidiaries, provides competitive local access and exchange services. ACSI is headquartered in Annapolis Junction, Maryland, and currently has approximately 200 employees. The company constructed its first network in 1994. At present, ACSI has eleven operational local fiber optic networks and nine additional networks under construction.[2] The Company

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[1] FCC 96-182 (released April 19, 1996). ACSI submitted comments on first round issues on May 16, 1996.

[2] ACSI's currently operational networks are located in Albuquerque, NM; Columbus, (continued...)

intends to have 30 local networks in service or under construction by the end of the third calendar quarter of 1996.

Because ACSI is constructing its own fiber optic networks in the markets it serves, access to poles, ducts, conduit and rights-of-way owned or controlled by incumbent local exchange carriers ("ILECs") and incumbent electric utility companies ("Utilities") is critical to ACSI's long-term success. Both before and since passage of the Telecommunications Act of 1996 ("1996 Act"), ACSI has been attempting with mixed success to negotiate right-of-way agreements in the markets which it intends to serve. While reasonable access is available in some areas, other ILECs and Utilities refuse to provide access to right-of-way on nondiscriminatory terms. As is discussed herein, uniform national rules are required to ensure that access to those bottleneck facilities is promptly made available on just, reasonable and nondiscriminatory terms.

Similarly, national standards for dialing parity, requirements for notice of ILEC network changes and rules governing number administration, all are important precursors to fair and effective competition in the local services market. ACSI herein asks the Commission to establish explicit rules in each of these areas.

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[2](...continued)
SC; El Paso, TX; Fort Worth, TX; Greenville, SC; Lexington, KY; Little Rock, AR; Louisville, KY; Mobile, AL; Montgomery, AL; and Tucson, AZ. ACSI networks in the following cities are scheduled to be operational by September 30, 1996: Amarillo, TX; Baton Rouge, LA; Birmingham, AL; Charleston, SC; Columbus, GA; Irving, TX; Jackson, MS; Las Vegas, NV; and Spartanburg, SC.

I. NONDISCRIMINATORY ACCESS TO ILEC AND UTILITY RIGHT-OF-WAY IS CRITICAL TO THE EXPEDITIOUS DEPLOYMENT OF CLEC NETWORKS (¶¶ 220-225)

Construction of CLEC networks cannot begin until the company secures adequate right-of-way and pole, conduit or duct space to house its fiber-optic cabling. Such right-of-way usually is in short supply. The best routes normally are controlled by the ILECs and/or incumbent electric utilities. Obtaining access to these bottleneck facilities on nondiscriminatory terms is essential for ACSI and other CLECs to provide local network services economically.

Under the terms of the old Pole Attachment Act,[3] the Commission was required to "regulate the rates, terms and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and . . . adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions." These provisions provided important protection against discriminatory treatment once a carrier obtained access to ILEC poles, ducts, conduit and right-of-way. However, they suffered from a critical shortcoming -- i.e., the Pole Attachment Act imposed no obligation upon ILECs or utilities to provide access to such right-of-way to other carriers in the first instance. This enormous loophole was closed by the Telecommunications Act of 1996 ("1996 Act"), which established a new requirement that LECs provide access to their poles, ducts, conduit and right-of-way in a manner consistent with the requirements previously imposed by the Pole Attachment Act.

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[3] *Codified* at 47 U.S.C. § 224.

Specifically, Section 251(b)(4)[4] imposes upon LECs the "duty to afford access to the poles, ducts, conduits, and right-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224." As importantly, the 1996 Act further clarified that Utilities other than ILECs have a similar duty to grant all telecommunications carriers nondiscriminatory access to their right-of-way. Section 703 of the 1996 Act creates a new Section 224(f) of the Communications Act which provides that a "utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[5]

The importance of these newly created obligations cannot be overstated. ILEC and Utility control over these essential bottleneck facilities is the product of many years use of both utility eminent domain rights and investment of monopoly revenue streams. This is an experience which cannot be repeated by new entrants in a competitive marketplace. Thus, the FCC has correctly observed that access to the incumbents' right-of-way "is vital to the development of local competition, because it ensures that competitive providers can obtain access to facilities necessary to offer service."[6] Accordingly, it is important that the Commission act quickly to implement the terms of Sections 251(b)(4) and 224(f) by adopting explicit regulations governing access to existing utility right-of-way.

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[4] 47 U.S.C. § 251(b)(4).

[5] 47 U.S.C. § 224(f).

[6] *Notice* ¶ 220.

As a major developer of alternative local fiber optic networks, ACSI has considerable recent experience in attempting to obtain access to ILEC and Utility right-of-way. ACSI has found that the majority of ILECs and Utilities have been cooperative and reasonable. Indeed, ACSI has entered into important strategic relationships with several of them. However, on too many occasions, selected ILECs and Utilities have employed obstructionist tactics to delay ACSI's access to critical right-of-way indefinitely, or afford such access only on uneconomic terms. Examples include:

* Pole attachment and conduit access rates offered by incumbents often are market-based, and far exceed rates which would result from the use of any reasonable cost-based pricing methodology.

* Rates charged to CLECs commonly are 50-400 percent higher than rates charged to CATV providers[7] for access to the same facilities.

* Access has sometimes been refused to building riser, vault or similar space controlled by the ILEC, which is necessary to reach the demarcation point on the customer premises.

* Incumbents have contended that poles lack sufficient capacity to afford access to certain competitors, even when space is reserved for their own future use, or other (favored) carriers are given access.

A poignant illustration of the problem is provided by ACSI's own experience in attempting to obtain access to right-of-way controlled by a major electric utility which recently applied to the FCC for authority to provide service as an "exempt telecommunications carrier" ("ETC"). ACSI first requested access more than 18 months ago. After considerable coaxing, the utility provided a draft agreement more than a year later, but without any proposed pricing. ACSI inserted price terms which significantly

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[7] Including CATV providers that offer local telecommunications services.

exceeded the amount charged by the utility to CATV providers, and returned a signed agreement without further revision. The utility then refused to execute its own proposed agreement. Clearly, the lack of good faith -- and anticompetitive conduct -- demonstrated in this instance cannot be tolerated of an ETC or any other telecommunications carrier.

Similarly, another electric utility refused to provide pole attachments until ACSI agrees, (1) to pay rates approximately 400 percent higher than rates collected by it from CATV providers, and (2) waive its right to file any complaints at the FCC, now or in the future, against the utility concerning its rates. The electric utility informed ACSI that it does not recognize the FCC's authority in this area. Under the utility's interpretation of the 1996 Act, ACSI's recourse is limited to the filing of an "eminent domain" action in state court. Such rogue behavior simply must not be permitted to continue.

In yet another example, a BOC is currently charging ACSI approximately 73 percent more than CATV providers for identical pole attachments and conduit. This puts ACSI at a demonstrable and artificial cost disadvantage when the CATV provider elects to provide telecommunications services.

To resolve this dilemma, ACSI urges the FCC to immediately adopt rules which both define the substantive obligations of ILECs and Utilities to provide access to poles, ducts, conduit and right-of-way, *and* establish expedited procedures which CLECs and other interconnectors can employ to enforce their rights. These rules should, at a minimum, include each of the following requirements:

* Rules should apply equally to all ILECs, electric utilities, other incumbent utility companies *and* their affiliates.

* Applicants for ETC status must affirmatively demonstrate that both they *and* their affiliates[8] provide access to right-of-way to all competitors on a nondiscriminatory basis.

* ILECs and Utilities must respond to bona fide requests for access to poles, ducts, conduit and right-of-way within 10 business days of receipt, with written reasons stated for any refusal to provide access, and access generally should be made available within 30 days thereafter.

* Access must be provided to *all* poles, ducts, conduits and right-of-way *owned or controlled* by the incumbent, including building risers and vault access/building entrance where such facilities are under the incumbent carrier's control.

* Access must be provided on identical terms (including rates) to all CLECs, CATV providers and other telecommunications providers.

* Access must be provided on the same terms that the ILEC or Utility applies to itself or an affiliate for similar uses.

* All agreements executed prior to the 1996 Act may be voided by the CLEC, and renegotiated subject to the terms of the 1996 Act.[9]

* When access is refused, the ILEC or Utility has the burden of proving by a preponderance of the evidence that "insufficient capacity" exists or that access was denied for "reasons of safety, reliability and generally applicable engineering purposes."[10]

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[8] ETCs should not be able to shirk this responsibility by stating that the poles, conduit or right-of-way at issue belong to a regulated parent or unregulated affiliate. At a minimum, CLECs should be able to obtain right-of-way on the same terms as such right-of-way is made available to an ETC by its affiliate.

[9] Pre-1996 Act agreements were negotiated in an era when no statutory right-of-access existed, and carriers which lacked any bargaining leverage often were forced to accept contracts of adhesion. ACSI suggests that the FCC establish a six-month "fresh look" period, during which period CLECs may terminate and renegotiate their existing right-of-way agreements.

[10] 47 U.S.C. § 224(f)(2). *See Notice* ¶ 222.

* Rules should clarify that sufficient capacity exists to provide competitive access if any presently unused capacity exists, that space may not be reserved by the ILEC or Utility for their own future use, and where space is limited, available space must be allocated equitably among all telecommunications carriers requesting access.

* Denials for reasons of safety, reliability and engineering purposes must rest on generally accepted and published industry engineering criteria or technical standards, and reasons for denial must be applied consistently to all telecommunications carriers, including the ILEC or Utility and its affiliates.

* Complaints or petitions alleging violations of these requirements should be resolved by the FCC within 90 days of filing, and the ILEC or Utility should have the burden of proving that the rates, terms and conditions of access are just, reasonable and nondiscriminatory.

* All ILECs and Utilities should file periodic reports of the number of right-of-way agreements entered by them, and descriptions of the basic terms of each such agreement.

The need for action is immediate. The inability of CLECs to obtain access to critical right-of-way is delaying the deployment of alternative local networks materially. There undeniably is some overlap between this proceeding and the Commission's inquiries in Dockets 96-101 and 96-98, as well as future proceedings pursuant to new Section 224(e)[11] to promulgate new regulations governing pole attachment rates. However, the FCC should not delay acting on ACSI's recommendations on that ground. Action to implement new Sections 251(b)(4) and 224(f) is needed *now*, and should be taken in this docket.

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[11] Section 703 of the 1996 Act. *See Notice* ¶ 221.

II. DIALING PARITY IS NECESSARY TO CREATE A LEVEL PLAYING FIELD FOR LOCAL COMPETITION (¶¶ 202-219)

Section 251(b)(3) requires LECs to provide dialing parity to competing providers of telephone exchange service and telephone toll service. ACSI agrees with the Commission's tentative conclusion that this section requires a LEC to establish uniform dialing requirements to reach any customer within a local calling service area, regardless of the called or calling party's local service provider.[12] Customers should have to dial the same number of digits to place a local call, regardless of whether the called party is served by a competing local service provider or by the same local service provider. Requirements that callers use access codes, special PINs, or *any* other impediment to dialing, therefore, should be prohibited. In short, the identity of the called party's local service provider should be irrelevant -- indeed, should be completely transparent -- to the calling party.[13]

In addition, ACSI agrees with the Commission's tentative conclusion that whether a LEC provides "nondiscriminatory access" to telephone numbers, operator services, directory assistance and directory listings should be judged based upon the access the LEC gives itself to these services.[14] The central element of nondiscrimination is the principle that a LEC treat competing providers in the same manner it treats itself. Thus, the technical standards and quality of service standards applicable when the LEC provides any of these services to itself should be equal to that which apply when a competing provider purchases them. In

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[12] *Notice* ¶ 211.

[13] *See Notice* ¶ 212.

[14] *Notice* ¶ 214.

particular, it is important to define the "unreasonable dialing delay" referred to in Section 251(b)(3) with reference to the standards met by the LEC itself. Both the LEC and competing providers should get equal priority in LEC call processing systems, which would result in identical dialing delays, on average, for LECs and competing providers. Therefore, the Commission should declare a dialing delay "unreasonable" if the average access time for competing providers exceeds the average access time for the LEC itself.

Finally, although balloting for local service providers is not feasible at this time, ACSI agrees that there is a need for consumer education to educate consumers on the fundamental changes underway in the local services market. The most cost-effective way to achieve this is to require ILECs to provide bill inserts to their customers alerting them to the changes that will occur in the industry. These inserts should inform customers that they have the opportunity to select a local service provider of their choice, that they will be able to retain their same phone number regardless of the local service provider they choose, that they can call all telephone numbers in their area regardless of the customer's local service provider, that their telephone numbers will be included in all existing directories, and that the industry is developing technical standards to ensure service quality will not be affected by the advent of competition. ACSI recommends that the Commission establish a Task Force to develop the precise language of such a bill insert, and that ILECs be directed to mail such inserts to each customer once every six months for the next two years.

III. ILECS MUST PROVIDE NOTICE OF TECHNICAL CHANGES (¶¶ 189-194)

The Act requires ILECs to provide "reasonable public notice" of technical changes that could affect the transmission or routing of telecommunications services.[15] ACSI agrees with the Commission's tentative conclusion that this requirement applies broadly to *any* information that would affect "interconnectors' performance or ability to provide services."[16] Notice should be provided whenever a change might affect the way in which a competing provider offers its service, including, but not limited to, changes in signaling standards, changes in call routing or network configuration, and changes in the logical elements of the network. In addition, the content of the notice should specifically identify, at a minimum, what will be changed, how it will be changed, when the change will be effective (including transitional requirements), and the impact of the change on current interconnection or access arrangements.[17]

As the Commission notes, in addition to determining the content of such notices, it also must determine when such notice will be given. ACSI believes the Commission's *Computer III* disclosure requirements provide a useful starting place for determining when technical notices should be made.[18] ACSI recommends, however, that any network changes

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[15] 47 U.S.C. § 251(c)(5).

[16] *Notice* ¶ 189.

[17] *See Notice* ¶ 190.

[18] *Notice* ¶ 192. The *Computer III* rules require disclosure of network changes at the "make/buy" point, *i.e.*, at the point where the LEC must decide whether to make the product itself or to procure it from an unaffiliated entity. It also requires a minimum of six months' notice before any technical changes may take effect.

which will require modification of the physical form of interconnection should be made only upon at least 12 months' advance notice, and must include a permissive transition period of at least an additional six months after the change becomes effective. This period will minimize the disruption and capital expense imposed on competitive providers by changes in the ILECs' network, and will allow sufficient time for CLECs to reconfigure their interconnection needs as necessary to respond to the change.

IV. UNIFORM NATIONAL RULES FOR NUMBER ADMINISTRATION ARE REQUIRED (¶¶ 250-259)

ACSI strongly agrees with the Commission's tentative conclusion that it should retain its authority to "set policy with respect to all facets of numbering administration . . ."[19] However, despite this conclusion, the Commission proposed to reaffirm its policy of delegating matters involving area code relief to state commissions, subject to the federal guidelines established in its *Ameritech Order*.[20] ACSI commends the Commission for the safeguards against discrimination and anticompetitive activity included in the *Ameritech Order*, but believes that the action to delegate decision-making authority on this topic to state commissions was mistaken. ACSI submits that there is a national interest in enforcing uniform and nondiscriminatory area code assignments, and that the FCC itself should govern the area.

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[19] *Notice* ¶ 254.

[20] *See Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech, Illinois*, Declaratory Ruling and Order, 10 FCC Rcd 4596 (1995) (*Ameritech Order*) (*recon. pending*). *See also Notice* ¶¶ 255-257.

In the interest of continuity, ACSI also concurs with the FCC's tentative conclusion to allow BellCore and the LECs (as central office code administrators) to continue their current number administration functions until a neutral number administrator is selected in accordance with its *NANP Order*.[21] However, ACSI urges the Commission to expedite appointment of a neutral number administrator and the attendant transfer of number administration functions.

Finally, the Commission sought comment on the recovery of costs related to number administration.[22] In its *NANP Order*, the Commission previously directed that the costs of the new neutral number administrator be recovered through contributions by *all* telecommunications providers computed on the basis of each provider's gross revenue.[23] ACSI agrees that this approach complies with the requirements of Section 251(e)(2) of the 1996 Act,[24] and that the Commission should reaffirm the policy.

CONCLUSION

Unfortunately, there are powerful incentives for ILECs and Utilities to refuse to provide reasonable access for CLECs to their right-of-way. Similarly, ILECs would benefit materially by establishing disparate dialing arrangements, hiding technical changes or

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[21] *See Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, FCC 95-283 (released July 13, 1995) (*NANP Order*) (*recon. pending*).

[22] *Notice* ¶ 259.

[23] *NANP Order* ¶¶ 94-99.

[24] *Notice* ¶ 259.

discriminating in administration of the numbering system. Thus, consistent with the intent and requirements of the 1996 Act, the FCC should quickly adopt rules which ensure just, reasonable and nondiscriminatory treatment.

Respectfully submitted,

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May 20, 1996

CERTIFICATE OF SERVICE

I do hereby certify that on this 16th day of May, 1996, a true and correct copy of the foregoing *Comments of American Communications Services, Inc.* was served via hand delivery to:

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